SUPREME COURT OF QUEENSLAND

CITATION:	*Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 3)* [2019] QSC 185	
PARTIES:	First Plaintiffs:	**SANRUS PTY LTD AS TRUSTEE OF THE QC TRUST ACN 097 049 315**
		AND
	Second Plaintiffs:	**EDGE DEVELOPMENTS PTY LTD AS TRUSTEE OF THE KOWHAI TRUST ABN 26 010 309 529**
		AND
	Third Plaintiffs:	**H&J ENTERPRISES (QLD) PTY LTD AS TRUSTEE OF THE H&J TRUST ACN 077 333 736**
		AND
	First Defendants:	**MONTO COAL 2 PTY LTD ACN 098 919 414**
		AND
	Second Defendants:	**MONTO COAL PTY LTD ACN 098 393 072**
		AND
	Third Defendants:	**MACARTHUR COAL LIMITED ACN 096 001 955**
FILE NO/S:	SC No BS8609/07	
DIVISION:	Trial Division	
PROCEEDING:	Application	
DELIVERED ON:	1 August 2019	
DELIVERED AT:	Brisbane	
HEARING DATE:	17 July 2019	
JUDGE:	Bond J	
ORDER:	**The orders of the Court are that:**	

1. Subject to the plaintiffs' right to object on the grounds of relevance, the affidavits of Ms Morcom [CRT.020.016.0001] and Ms Tognini

[CRT.020.017.0001] are admitted as evidence in the trial.

2. The defendants must make the deponent available for cross-examination on a date to be fixed, if, within 2 business days of the date of this order, the plaintiffs notify them that the deponent is required for cross-examination.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PROCEDURAL ASPECTS OF EVIDENCE – AFFIDAVITS – where the defendants sought leave to rely in the trial on affidavits from two of the defendants' solicitors addressing an explanation why the defendants were not calling particular witnesses – where the affidavits were not filed within the time required specified by case management orders for delivery of witness summaries – whether leave should be granted

COUNSEL: P L O'Shea QC for the plaintiffs
A M Pomerenke QC for the defendants

SOLICITORS: Holding Redlich for the plaintiffs
Allens for the defendants

[1] An order by Applegarth J on 23 November 2017 imposed a timetable on the plaintiffs and the defendants to file and serve summaries of the evidence from lay witnesses from whom they intended to lead evidence at trial. Insofar as the order applied to the defendants it required:

> 4. By 20 April 2018, the defendants:
>
> […]
>
> (c) file and serve summaries of the evidence of each lay witness from whom they intend to lead evidence at trial, summarising the evidence they anticipate will be given by that witness and identifying any documents to be referred to by that witness;
>
> […]
>
> 12. Except with the leave of the court:
>
> (a) no party will be permitted at the hearing of this proceeding to adduce evidence-in-chief from a lay witness about a topic not identified in a summary of evidence filed and served in accordance with these orders;
>
> […]

[2] My order of 21 December 2018 at [19](a) repeated the restriction imposed by [12](a) of the order of Applegarth J. My order required subpoenas for production of documents to be returnable on 8 March 2019, but did not impose a timetable applicable to subpoenas to compel the presence of a witness to give evidence. My order also required an updated trial plan to be submitted by 25 March 2019 which, amongst other things, required the parties to identify their witnesses, the estimated duration of each witness' evidence and the sequence in which witnesses would be called.

[3] An application was made orally on day 47 of the trial of this proceeding by the defendants, that I grant leave to the defendants to rely on an affidavit of Ms Morcom and an affidavit of Ms Tognini as their respective evidence in chief in the trial. The application was opposed by the plaintiffs.

[4] The stage at which the trial has reached is as follows:

(a) the evidence of the plaintiffs' lay witnesses is complete;

(b) subject to the disposition of this application, and with two caveats, the evidence of the defendants' lay witnesses in the trial is complete;

(c) the process of finalising joint expert reports after joint expert conclaves is complete;

(d) the hearing of the expert opinion evidence from both sides will commence on 5 August 2019 and is scheduled to run until 6 September 2019;

(e) there will then be an adjournment during which written submissions will be finalised and delivered; and

(f) oral addresses will commence on 8 October 2019.

[5] The first caveat mentioned in [4](b) above is that one of the defendants' witnesses is still under cross-examination, but that witness is suffering ill-health and the question whether that witness will be able to give any further evidence in the trial is, as yet, unresolved. The second caveat is that my order of 21 December 2018 reserved to the defendants leave to recall lay witnesses in certain circumstances. Neither caveat is said to be presently relevant.

[6] Ms Morcom's affidavit dealt with Mr Denis Wood. I make the following observations:

(a) Ms Morcom is a solicitor in the employ of Allens, the solicitors for the defendants. Her affidavit exhibited email communications which took place between Allens and Mr Wood. There was no evidence before me on the application which explained who Mr Wood was. Other evidence already admitted in the trial tells me that Mr Wood attended some relevant meetings on behalf of Macarthur Coal and that he had commissioned the Stage 1 Feasibility Study on behalf of that company in January 2002.

(b) On 21 August 2016, in response to an email request from Allens that he finalise a draft affidavit or statement which the defendants' previous solicitors may have prepared concerning some financial modelling work he did for Macarthur Coal, his email response was (apart from a passage redacted on the ground of privilege) "Further, I have spent more than enough time on this issue and as such I am no longer prepared to waste any of my time. Please do not bother to ring."

(c) On 22 January 2018 Ms Morcom emailed Mr Wood; drew to his attention allegations made in the plaintiffs' material concerning his conduct; and said that, given the nature of the allegations, Allens wanted to provide him with an opportunity to respond. The email concluded with request that he let Allens know if he did not wish to be provided with that opportunity.

(d) Mr Wood responded with an email sent from Africa with an indication that he would get advice on his return to Australia in February 2018. There followed two further emails from Allens seeking a response. Mr Wood responded by email on 13 March 2018 which relevantly stated that he had reviewed the material provided to him and saw no reason to comment at that stage.

[7] Ms Tognini is also a solicitor in the employ of Allens. Her affidavit dealt with Mr Peter Kane. I make the following observations:

(a) There was no evidence before me on the application which explained who Mr Kane was. Other evidence already admitted in the trial tells me that Mr Kane was an employee of Macarthur Coal at some relevant times.

(b) Ms Tognini's affidavit contained material which suggested Mr Kane was no longer an employee of that company or of any company associated with it; and that when, in

October 2017, Ms Tognini had called him with a view to arranging a time for a conference to discuss the preparation of a witness statement in respect of this proceeding, Mr Kane told her that he really could not recall anything that happened and could not see any point in meeting, he was very busy and it was a waste of his time to do so.

[8] The apparent purpose of the defendants seeking to tender the solicitors' affidavits in the trial was to provide evidence which might assist the defendants to meet any future reliance by the plaintiffs on the rule in *Jones v Dunkel* (1959) 101 CLR 298 in respect of the failure of the defendants to call Mr Wood and Mr Kane. The defendants accepted that the first time that they notified the plaintiffs of their intention to rely on the affidavit evidence was 8 July 2019. They accepted that no witness summary had ever been delivered in respect of either deponent.

[9] Senior counsel for the plaintiffs opposed the tender of the two affidavits, making the following submissions:

(a) No explanation has been given for the delay in meeting the requirements of the orders previously made about when witness summaries were required. The substance of the evidence contained in the affidavits should have been notified to the plaintiffs within the time frame ordered by Applegarth J. (No point was taken about the evidence being in affidavit form as opposed to summary form.)

(b) Because of that failure to notify, the plaintiffs had been deprived of the opportunity to consider this evidence back in 2018, and to make inquiries about it with the idea of testing it. In particular they had been deprived of the opportunity of making inquiries of Mr Wood or Mr Kane as to whether the evidence of the two solicitors were an accurate reflection of the communications between the solicitors and the potential witness. Further to that point and in relation to Mr Wood, there might be something in the part of the email which was redacted on the ground of privilege which might be relevant to whether he truly was non-cooperative in 2016.

(c) If the plaintiffs had known in 2018 that the witnesses were not cooperating with the defendants and that any potential *Jones v Dunkel* submission may have been defused, the plaintiffs could then have considered whether the issue was sufficiently important to warrant them calling Mr Wood or Mr Kane themselves. The plaintiffs had been deprived of that opportunity.

[10] The tender was supported in this way by Senior Counsel for the defendants:

(a) Although, strictly speaking, leave was required pursuant to [19](a) of my order of 21 December 2018 because the affidavits were capable of being characterised as containing evidence in chief from lay witnesses, the primary mischief addressed by the orders about witness summaries was the avoidance of surprise in relation to evidence addressing the material facts in issue in the case. Because the reliance on the affidavits was outside the primary mischief at which the requirement for leave was directed, the nature of the non-compliance should be regarded as less significant.

(b) As to the first suggested ground of prejudice, if necessary the plaintiffs could have whatever time they required to make whatever enquiries they wished to make before determining whether to cross-examine the two deponents.

(c) As to the second suggested ground of prejudice, the failure to deliver witness summaries by the two present deponents in 2018 could not have deprived the plaintiffs of the opportunity of calling either Mr Wood or Mr Kane. Even if the defendants had provided evidence in 2018 explaining that the defendants had not provided any witness summary for either Mr Wood or Mr Kane because the witness

had not co-operated, it would still have been open for the defendants to compel the attendance of the witness by subpoena. The decision not to do so does not occur until the defendants get to the end of their case.

[11] My analysis of the issue before me is as follows.

[12] If the plaintiffs ultimately have a good argument that the rule in *Jones v Dunkel* applies in relation to any evidence which Mr Wood or Mr Kane could have given (and I presently express no view as to that question), it will be because the plaintiffs have failed to call either Mr Wood or Mr Kane to give that evidence.

[13] The pre-trial management orders concerning the delivery of witness summaries by a particular time did not require the defendants to make (and to disclose their reasons for making) by that time a decision whether they would subpoena non-cooperating witnesses. It was open to the defendants to subpoena either Mr Wood or Mr Kane to give evidence at any time before the close of their case. The plaintiffs' arguments about having been caused prejudice because they were not given notice of the evidence by May 2018 must be rejected.

[14] If the defendants had decided to subpoena a non-cooperating witness, they would have needed my leave to adduce evidence in chief from the witness when the witness attended in compliance with the subpoena, but proof that the witness had not co-operated for the purpose of preparation of witness summaries would have been a compelling reason for the grant of such leave. If that course was open to the defendants, then it must be legitimate for them to adduce evidence probative of the explanation why they did not take that course.

[15] There is an argument – not advanced by the plaintiffs – that there has been a degree of non-compliance with the orders of the Court by the defendants. Because compliance with orders regarding the preparation of a trial plan required witnesses to be identified, it may be that the orders should be regarded as impliedly required the defendants to make the decision about compelling witnesses by subpoenas (or calling other witnesses to explain why they were not doing so) by the time the trial plan was required. Accordingly, it may be that the defendants should have told the plaintiffs and the Court by 25 March 2019 that they intended to adduce evidence from the two present deponents (and, implicitly, that they were not intending to compel the presence of either Mr Wood or Mr Kane). As this was not the subject of argument (and as the plaintiffs' argument about prejudice turned on not being given notice of the proposed evidence in May 2018, not at the end of March 2019) it is not necessary to consider this point further.

[16] Accordingly, subject to some conditions to which I will return, my ruling is that the defendants should have the leave they seek.

[17] The first condition is that the defendants should make the deponents available for cross-examination by the plaintiffs, if required. Presently I am minded to allow the plaintiffs two days to decide whether they wish to take that course, but I would be willing to consider an application by them for more time if it should prove necessary to conduct enquiries before making the decision.

[18] The second condition is that I would reserve to the plaintiffs the right to object to the affidavits on the grounds of relevance. I have not received argument on this point. I can see why the evidence of Ms Tognini might be relevant, because it suggests that Mr Kane told the defendants' solicitors he had no relevant recollection and that might be said to be a reasonable explanation for not compelling his attendance by subpoena. On the other hand, it is less easy to see how the evidence of Ms Morcom is relevant to whether there was a good explanation for the failure to compel attendance of Mr Wood.

[19] I order as follows:

(a) Subject to the plaintiffs' right to object on the grounds of relevance, the affidavits of Ms Morcom [CRT.020.016.0001] and Ms Tognini [CRT.020.017.0001] are admitted as evidence in the trial.

(b) The defendants must make the deponent available for cross-examination on a date to be fixed, if, within 2 business days of the date of this order, the plaintiffs notify them that the deponent is required for cross-examination.